Five-to-Four: The Case for a Defensive Redesign of the CFPB

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Much has been written about the "agency design" of the Consumer Financial Protection Bureau (CFPB) over the past eight years. Scholarship in this area has primarily focused on why the CFPB may be unconstitutionally structured and whether that structure could survive judicial scrutiny should the issue reach the Supreme Court. Due in part to recent upheavals in the political landscape of the federal government—from the election of a conservative President who espouses a judicial-centric political strategy to the appointment of two staunchly conservative Supreme Court Justices—there is no longer a clear path forward for the CFPB, which is currently facing constitutional scrutiny at the Supreme Court. Having granted certiorari to the Ninth Circuit in a case upholding the constitutionality of the CFPB, the Court has already heard oral arguments and is expected to issue an opinion by early Summer 2020. In consideration of the pressures that the Bureau faces in the short term, this Note approaches the CFPB's constitutional-design question from a future-oriented perspective, ultimately suggesting an answer to the Bureau's critical existential question: How can it continue to exist as a useful administrative agency while maintaining some level of insulation from the whims of political change that will both inevitably and periodically disrupt its mission in the future?

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Introduction

Since the inception of the administrative state, the "fourth branch's" accumulation of power and responsibility has been subject to constitutional scrutiny for various reasons. For most of the past century, the Supreme Court focused its agency-design attention on how certain agency structures may unconstitutionally redistribute power between the Legislature and the Executive. It was not until the Court's seminal decision in *Free Enterprise Fund v. Public Company Accounting Oversight Board*[1]—which instead considered whether the Public Company Accounting Oversight Board's (PCAOB) design gave other branches adequate checks on its power—that there was any indication that the novelty of an agency's structure could be violative of the Constitution in relation to its impact on traditional separation-of-powers concerns.[2]

Coupled with a robust dissent from Judge (now Justice) Brett Kavanaugh in *PHH Corp. v. Consumer Financial Protection Bureau*,[3] *Free Enterprise* indicates that our judiciary could ultimately adopt a new theory of agency-design jurisprudence under which separation-of-powers scrutiny will give way to resolute checks on the swelling fourth branch. This Note begins with the principal assumption that the Supreme Court is likely to adopt

1. 561 U.S. 477 (2010).
2. *Id.* at 496–97.
3. 881 F.3d 75, 164 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting).

Justice Kavanaugh's argument against the structure of the CFPB, and it considers the unfortunate effects that this result will have on both the CFPB and the Legislature. Building from that premise, this Note argues that the Supreme Court's intervention is harmful to the Legislature. Any judicial outcome will either weaken the CFPB and maintain its primary design flaw—its Director's five-year term—or render a binding judgment against the CFPB's design that will impede the Legislature from responding to complex problems with novel agency structures in the future.

Unfortunately, the outcome described in this Note is all but a foregone conclusion, as the Legislature is no longer in a position to preemptively restructure the CFPB to deter constitutional scrutiny of its design. Nevertheless, in consideration of the principles underlying the *Free Enterprise* and *PHH* decisions, this Note focuses on both the CFPB Director's for-cause removal protection and the Bureau's unique combination of independence-granting features intended to insulate it from the other branches' control. Regardless of its treatment in the Supreme Court, the CFPB ought to be made anew via a legislative redesign aimed at ceding some of its independent authority back to the Executive and Legislative Branches, maintaining its essential components of independence, and eliminating a design flaw that is both harmful to the Bureau and constitutionally suspect: the Director's five-year term.

This Note proceeds in three Parts. Following this Introduction, Part I assesses the relative likelihood of possible outcomes of the CFPB issue in the Supreme Court. Recent Supreme Court signaling about the constitutional concerns that "novel" agency designs produce suggests that the Supreme Court is most likely to alter, rather than eliminate, the CFPB. Part II considers the potential costs of various outcomes from a *realpolitik* perspective. The Legislature should be wary of a limiting jurisprudential theory of agency design, as it benefits significantly from ambiguity surrounding the issues of for-cause removal and its severability. Finally, Part III suggests a simple, two-part restructuring plan that would shield the CFPB from future constitutional scrutiny and allow the Legislature to continue exploring the outer bounds of constitutional agency design. In substance, the Legislature should respond to *any* Supreme Court outcome by redesigning the CFPB, keeping (or reinstating) the Director's for-cause removal protection, but limiting the Director's tenure to only four years. Additionally, the Legislature should consider subjecting the CFPB's budget to approval by the Federal Reserve Board.

I. The Supreme Court Will Most Likely Declare the CFPB's Design Unconstitutional

Interminable scrutiny followed the CFPB after its doors opened in 2011.[4] Citing concerns that the CFPB was "too large, powerful, and immune from oversight," House Republicans introduced at least four bills aiming to curtail the power and structure of the Bureau in 2011 alone.[5] One year later, President Obama punctuated skepticism surrounding the Bureau's legitimacy by deciding to make an end-run "recess" appointment of Richard Cordray to the position of CFPB Director, avoiding the Senate approval process and drawing predictable criticism from congressional Republicans.[6]

Legal challenges to the constitutionality of the CFPB's design soon emerged, making their way to the courts of appeals in 2015.[7] Such efforts proved unsuccessful and yielded little judicial clarity on the topic.[8] An abrupt change occurred in 2016, however, when Judge Brett Kavanaugh, writing for a panel of D.C. Circuit judges, held that the CFPB Director's for-cause removal protection violates Article II of the Constitution.[9] Though later vacated after rehearing en banc,[10] Kavanaugh's panel opinion promulgated the first seemingly valid avenue for finding the CFPB to be unconstitutionally structured in light of both historical considerations and Supreme Court precedent.

Both the en banc *PHH* majority opinion and then-Judge Kavanaugh's dissent relied upon conflicting interpretations of *Free Enterprise*, a 2010 Supreme Court decision that found the "dual for-cause limitations" on the removal of members of the PCAOB to "contravene the Constitution's separation of powers."[11] Put simply, the Sarbanes–Oxley Act (SOX) made PCAOB members removable for cause only by the Securities and Exchange Commission (SEC), whose members are, in turn, only removable for cause by the President.[12] Because of this "double insulation," the Supreme Court

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4. *See* Brenden D. Soucy, Note, *The Consumer Financial Protection Bureau: The Solution or the Problem?*, 40 FLA. ST. U. L. REV. 691, 694 (2013) (noting that the CFPB "has been surrounded in controversy since its creation" and Republicans initially intended to filibuster any Director confirmation vote "until structural reforms were made to the CFPB").

5. Raghav Ahuja, Comment, *Constitutional in Name: The Bureau of Consumer Financial Protection and the Obama Administration's Treatment of the Nondelegation Principle and the Appointments Clause*, 14 U. PA. J. CONST. L. 271, 277 & n.26 (2011).

6. *See* Soucy, *supra* note 4, at 695 ("House Speaker John Boehner referred to the action as 'an extraordinary and entirely unprecedented power grab by President Obama that defies centuries of practice and the legal advice of his own Justice Department.'").

7. *E.g.*, Morgan Drexen, Inc. v. Consumer Fin. Prot. Bureau, 785 F.3d 684 (D.C. Cir. 2015); State Nat'l Bank of Big Spring v. Lew, 795 F.3d 48 (D.C. Cir. 2015).

8. *Morgan Drexen*, 785 F.3d at 697–98; *Lew*, 795 F.3d at 57.

9. PHH Corp. v. Consumer Fin. Prot. Bureau, 839 F.3d 1, 8 (D.C. Cir. 2016), *rev'd en banc*, 881 F.3d 75 (2018).

10. PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 77 (D.C. Cir. 2018) (en banc).

11. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 492 (2010).

12. *Id.* at 495.

held that the President's remaining Article II power over the PCAOB was too attenuated for SOX to pass muster under separation-of-powers principles.[13]

The *PHH* en banc majority focused on language in *Free Enterprise* and suggested that the "extreme variation on the traditional good-cause removal standard" provided in SOX was defective because it "withdr[ew] from the President any decision on whether good cause exists"[14] (i.e., a barrier existed between the President's determination of good cause and the removal of a PCAOB member). In contrast, the en banc majority concluded that the CFPB Director's for-cause removal protection does not limit the President's power to remove the Director for good cause and is therefore "fully compatible with the President's constitutional authority."[15]

Judge Kavanaugh's dissent seized upon different language in *Free Enterprise*, which tended to show that it was the "novelty" of the dual for-cause removal provision that makes it constitutionally impermissible: "We deal with the unusual situation, never before addressed by the [Supreme] Court, of two layers of for-cause tenure. And though it may be criticized as 'elementary arithmetical logic,' two layers are not the same as one."[16] From this, Judge Kavanaugh derived the following test: "[A]n independent agency's structure violates Article II when it is not historically rooted and when it causes an *additional* diminution of Presidential control beyond that caused by a traditional independent agency."[17] By combining for-cause removal with a five-year term of tenure, Kavanaugh claimed, the Dodd–Frank Act could hypothetically give rise to a situation in which an unlucky President would have "zero influence through appointment" over the CFPB Director.[18] He considered this a "much starker case of unconstitutionality" than the "marginal" diminution of authority that a second layer of for-cause removal protection offered the PCAOB before *Free Enterprise*.[19] These conflicting interpretations of what fundamentally constitutes a diminution of the President's Article II power—the inability to directly remove the CFPB Director for good cause versus the potential that a President will never exercise "non-removal" appointment power over the Director—will almost certainly be the centerpiece of the Supreme Court's CFPB decision.

Given that a Supreme Court opinion on this issue is imminent,[20] it is important to acknowledge the significance of recent changes to the political

13. *Id.* at 496.

14. *PHH*, 881 F.3d at 89.

15. *Id.* at 92.

16. *Free Enter.*, 561 U.S. at 501 (citation omitted).

17. *PHH*, 881 F.3d at 188 (Kavanaugh, J., dissenting).

18. *Id.* at 190.

19. *Id.* at 190–91.

20. *See* Consumer Fin. Prot. Bureau v. Seila Law LLC, 923 F.3d 680 (9th Cir. 2019), *cert. granted*, 140 S. Ct. 427 (2019) (mem.). The Court also denied certiorari before judgment to the Fifth Circuit over a pending interlocutory appeal from the Southern District of Mississippi, which upheld

makeup of the Supreme Court insofar as it would affect potential outcomes for the CFPB. Most obviously, Brett Kavanaugh is a now a confirmed Justice, and his role as the architect of the case for severing the CFPB Director's for-cause removal protection would necessarily influence the conservative cadre of the Court.[21] Additionally, long before Justice Kavanaugh ever made President Trump's short list of Supreme Court nominees, it was taken as a given that "a Justice Gorsuch [was] likely to vote to strongly curtail the independence of the [CFPB]."[22] With the combined forces of Justice Thomas, Justice Alito, and Chief Justice Roberts, all of whom have "[i]nvok[ed] an exceptionally aggressive view of the separation of powers" and expressed vehement opposition to "the perils of the administrative state," it is virtually inevitable that the Supreme Court will garner the five necessary votes to curtail the independence of the CFPB.[23]

However, partisan alliances are only the starting point for examining a question of such constitutional importance. The central question is how the conservative Justices will frame their repudiation of the CFPB's design, and, even more significantly, what remedy they will impose to cure its alleged constitutional defects. The following analysis considers the two most likely outcomes of the Justices' deliberation: severance of the CFPB Director's for-cause removal protection, or a blanket declaration that Title X of Dodd–Frank is unconstitutional. It further considers and rejects the notion that the CFPB's structure could be declared fully constitutional.

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the constitutionality of the CFPB. All Am. Check Cashing Inc. v. Consumer Fin. Prot. Bureau, 140 S. Ct. 646 (2019) (mem.) (denying certiorari before judgment). The issue is also pending in the Second Circuit. Consumer Fin. Prot. Bureau v. RD Legal Funding, LLC, 332 F. Supp. 3d 729 (S.D.N.Y. 2018), *appeal docketed*, No. 18-3033 (2d Cir. Sept. 17, 2018). Also relevant is the Fifth Circuit's recent en banc decision to sever the for-cause removal protection of the Director of the Federal Housing Finance Agency, an agency structured nearly identically to the CFPB, as infringing on the President's Article II removal power. Collins v. Mnuchin, 938 F.3d 553 (5th Cir. 2019) (en banc).

21. There is, of course, a genuine possibility that Justice Kavanaugh will choose to recuse himself from the issues presented in this Note due to his prior engagements with nearly identical questions of law. This Note assumes that, because there is no statutory imperative for Supreme Court Justice recusal, Justice Kavanaugh will not choose to recuse himself. For an argument to this effect, see Alan S. Kaplinsky, *What Judge Kavanaugh Could Mean for the CFPB as a SCOTUS Justice*, NAT'L L. REV. (July 11, 2018), https://www.natlawreview.com/article/what-judge-kavanaugh-could-mean-cfpb-scotus-justice [https://perma.cc/WLN9-F3YW].

22. David J. Reiss, *Gorsuch, CFPB and Future of the Administrative State* 1 (Brooklyn Law Sch., Research Paper No. 483, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2915266 [https://perma.cc/S3VK-599E]; *see id.* at 4 (noting Justice Gorsuch's dedication to separation of powers and skepticism of "retroactive application of an agency's interpretation of a statute").

23. Joshua Matz, *The Imminent Demise of Chevron Deference?*, TAKE CARE (June 21, 2018), https://takecareblog.com/blog/the-imminent-demise-of-chevron-deference [https://perma.cc/HQ2C-E2CD].

A. The Supreme Court Will Probably Sever the CFPB Director's For-Cause Removal Protection

The Supreme Court commonly relies on severance to cure unconstitutional overreaches of power in legislative agency design.[24] This reliance is seemingly based on the premise that severance is, relatively speaking, a nonintrusive remedy that preserves the better part of the Legislature's intent without capriciously disrupting the ongoing functionality of the authorized agency. Judge Kavanaugh's panel opinion in *PHH* continues this trend by mirroring the holding of *Free Enterprise*: "Both decisions feature Article II constitutional violations, and both resolved the respective violations through tweaking the government agency, without shutting down either's day-to-day operations."[25]

The Court will likely frame its analysis of the CFPB's design along similar lines drawn in Judge Kavanaugh's en banc *PHH* dissent: "[Its] departure from historical practice, threat to individual liberty, and diminution of Presidential authority."[26] However, because the fundamental point of disagreement between the en banc majority and dissent in *PHH* was whether the CFPB's for-cause removal provision is inconsistent with Article II,[27] the Court could choose to provide a narrow holding (for example, traditional "independent agencies" cannot be led by single, insulated directors) based entirely on its reasoning in *Free Enterprise*. Such an opinion would certainly lend credence to the test Judge Kavanaugh derived from *Free Enterprise*: that "an independent agency's structure violates Article II when it is not historically rooted and when it causes an *additional* diminution of Presidential control beyond that caused by a traditional independent agency."[28] Adopting this test forces the Court to reject the *PHH* majority's suggestion that "the possibility that some future President will lack a regularly occurring vacancy to fill" is not a structural impediment to removal in the way the PCAOB's "dual-layer for-cause" structure was in *Free Enterprise*.[29]

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24. *See generally* Kristin E. Hickman, *Symbolism and Separation of Powers in Agency Design*, 93 NOTRE DAME L. REV. 1475, 1477–87 (2018) (explaining cases where the severance remedy was used).

25. Peter LeGrand, Note, *The Potential Unconstitutionality of the Consumer Financial Protection Board and Its Ramifications for the Elderly*, 25 ELDER L.J. 403, 424 (2018).

26. PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 193 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting).

27. *See id.* at 90–91 (majority opinion) ("The question for us, then, is whether the requirement that the President have cause before removing a Director of the CFPB unconstitutionally interferes with the President's Article II powers.").

28. *Id.* at 188 (Kavanaugh, J., dissenting); *see also id.* at 188–89 ("We deal with the unusual situation, never before addressed by the Court, of two layers of for-cause tenure. And though it may be criticized as 'elementary arithmetical logic,' two layers are not the same as one." (quoting Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 501 (2010))).

29. *Id.* at 100 (majority opinion).

Linking the Court's holding to *Free Enterprise* would also serve the expedient purpose of legitimizing Kavanaugh's proposed remedy to the CFPB's design: severance of the Director's for-cause removal protection. The Court in *Free Enterprise* explicitly rejected the argument that the PCAOB's "freedom from Presidential oversight and control rendered it and all power and authority exercised by it in violation of the Constitution."[30] Judge Kavanaugh further pointed out in his *PHH* dissent that the Dodd–Frank Act presents "an even easier case" for severability "[t]hrough its express severability clause," noting that "[i]t will be the rare case when a court may ignore a severability provision set forth in the text of the relevant statute."[31]

Precisely how the Supreme Court chooses to describe the CFPB's unconstitutionality is secondary to the overarching point at issue. Given the coherent roadmap developed by Justice Kavanaugh, it is highly likely that the Court will choose his path of least resistance, leaving the CFPB as a fully functioning agency with a Director subject to at-will removal by the President.

B. The Supreme Court Is Unlikely to Find the For-Cause Removal Provision Inseverable and Strike Title X of Dodd–Frank as Unconstitutional

Judge Karen Henderson separately dissented from the en banc *PHH* majority.[32] Though she substantially agreed with Judge Kavanaugh's finding that the CFPB is unconstitutionally structured, she disagreed regarding severance as an appropriate remedy.[33] Relying on the notion that a severability clause creates only a *rebuttable presumption* that the Legislature intended for constitutionally offensive provisions to be severable, she argued that § 5491(a) "ties the CFPB's very existence to its freedom from the President" by calling it "an independent bureau."[34] Further, Judge Henderson cleverly noted that a majority of the seven agencies whose consumer-protection authority the CFPB was meant to unite are relatively independent from Presidential control, so "reinventing" the CFPB as an executive agency "would by judicial decree transfer to the executive branch far-reaching new powers."[35]

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30. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 508 (2010) (internal quotation marks omitted).

31. *PHH*, 881 F.3d at 199 (Kavanaugh, J., dissenting); *see also* 12 U.S.C. § 5302 (2018) ("If any provision of this Act, an amendment made by this Act, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provisions of such to any person or circumstance shall not be affected thereby.").

32. *PHH*, 881 F.3d at 137 (Henderson, J., dissenting).

33. *Id.* at 160.

34. *Id.* at 161; 12 U.S.C. § 5491(a) (2018).

35. *PHH*, 881 F.3d at 162 (Henderson, J., dissenting).

Perhaps most compelling are Judge Henderson's citations to comments made by a plethora of the CFPB's backers and supportive amici emphasizing the Bureau's independence as a *sine qua non*.[36] She even quotes Representative Barney Frank as having called a materially identical severability provision "just boilerplate severability."[37] However, these expressions of legislative intent exist far beyond the plain text of Dodd–Frank, so the textualist-leaning arm of the Supreme Court is unlikely to consider such evidence sufficient to rebut the presumption in favor of severability.

Furthermore, a holding that the CFPB is unconstitutional would create a vexing problem for the Court: how to structure its opinion in a way that gives the Legislature guidance and certainty with respect to modifying the CFPB.[38] Though the *PHH* dissenters consider at-will removal a valid cure, it is evident that there are multiple ways to redesign the CFPB to avoid further constitutional scrutiny.[39] Crafting a holding that accurately expounds on the interrelatedness between the various independence-granting provisions of Title X could be an unmanageable feat.[40] On the other hand, a holding based on broad separation-of-powers principles could generate an avalanche of unintended consequences in the sphere of administrative law.[41]

It is not a foregone conclusion that the Supreme Court will seek to avoid the difficulties inherent in holding that Title X is entirely unconstitutional. However, due to the aforementioned trend towards severance and Justice Kavanaugh's clear support of its use in the case of the CFPB, it would be surprising for the Supreme Court to adopt such a heavy-handed, novel approach to checking the administrative state.

C. The Supreme Court Is Unlikely to Find the En Banc Majority's Argument in PHH *Compelling Enough to Declare the CFPB's Design Constitutional*

As described above, the *PHH* en banc majority opinion could provide an avenue for the Supreme Court to find the CFPB's design constitutional. However, though not entirely off base in its analysis, the majority's narrow perspective on the practical limitations of Presidential removal power will likely not persuade any of the five conservative voices on the Court.

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36. *Id.*

37. *Id.* at 163.

38. Lee A. Deneen, Note, *Defeating a Wolf Clad as a Wolf: Formalism and Functionalism in Separation-of-Powers Suits Against the Consumer Financial Protection Bureau*, 48 GA. L. REV. 579, 620 (2014).

39. *See infra* subpart III(B) (proposing a redesign).

40. *See* Deneen, *supra* note 38, at 620 (highlighting what the Court would have to consider in order to provide guidance following a holding of unconstitutionality).

41. *See infra* subpart II(B) (discussing agency-design consequences).

The case-law basis for the constitutionality of granting for-cause removal protection to independent directors is at least partially reliant on an understanding that for-cause removal protection should not be a "full stop" limit on the President's ability to affect the makeup of an agency without exercising good-cause removal. This basis comes from the seminal case *Humphrey's Executor v. United States*,[42] which established that the President's Article II power does not "prevent Congress from conferring good-cause tenure on the principal officers of certain independent agencies."[43] Notably, *Humphrey's Executor* involved a dispute over the for-cause removal protection of Federal Trade Commission members: five appointed commissioners who serve staggered, seven-year terms.[44] Because of that staggering—and despite the FTC commissioners' removal protection—any given president is guaranteed the opportunity to replace at least two directors via appointment. In unique circumstances, this arrangement affords some presidents the luxury of replacing all five in a single term.[45]

Therefore, the *PHH* en banc majority's determination that for-cause removal protection is a per se constitutional restriction on the President is not necessarily borne out in the case law upon which that doctrine is based. The notion that for-cause removal should not completely impede a president's ability to alter the makeup of an administrative agency makes intuitive sense in light of its shallow history: no recent President has attempted to remove a subordinate officer for good cause, and "no such attempt has led to litigation that resulted in judicial interpretation of the terms in a removal protection."[46] It appears that the political capital necessary to establish good cause and remove an insulated commissioner or director is impracticably demanding for a president. With that in mind, a president's inability to have any influence on a single director whose term length exceeds the president's certainly looks and feels like a questionable restriction on Article II power.

There may exist other legitimate grounds for questioning the *PHH* en banc majority's opinion, but the above example is provided merely to demonstrate that it would not be difficult for a conservative Supreme Court to justify some limitation of the CFPB's independence without straying from

42. 295 U.S. 602 (1935).

43. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 493 (2010) (citing *Humphrey's Ex'r*, 295 U.S. at 620).

44. *See Humphrey's Ex'r*, 295 U.S. at 619–20 (laying out the background of the dispute and explaining FTC selection practices). Based on the current makeup of the FTC, members' terms will expire in 2019, 2022, 2023, 2024, and 2025.

45. *See* Harper Neidig, *Senate Confirms Full Slate of FTC Commissioners*, HILL (Apr. 26, 2018, 6:19 PM), https://thehill.com/policy/technology/385096-senate-confirms-full-slate-of-ftc-commissioners [https://perma.cc/F4AZ-NT9U] (discussing the Senate's confirmation of five of President Trump's nominees).

46. Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 788 (2013).

its precedent. One would expect that, given these options, it would be astounding for the Court to find the CFPB's structure fully constitutional as the en banc D.C. Circuit did.

Perhaps counterintuitively, all of the potential decisions outlined here will be undesirable outcomes for the CFPB, the Legislature, and the consumers they aim to protect. The following Part explores that problem, demonstrating that Supreme Court interference with the CFPB will ultimately impede its long-term viability.

II. Any Supreme Court Ruling on the CFPB's Design Will Irreparably Harm both the CFPB and the Legislature

During times of hyperpartisanship and legislative inaction, it is tempting to expect the Supreme Court to formulate answers to controversial political questions.[47] Due to clear partisan division on the CFPB issue, legislative inaction with respect to the CFPB has predictably handed off the greater, constitutional question of agency design to the Supreme Court. Unfortunately, any Supreme Court decision on agency design will backfire on the Legislature, leaving the CFPB as collateral damage in its wake.

A. Severing the For-Cause Removal Provision Is an Intrusive Remedy and Creates More Problems for the CFPB than It Solves

Despite courts' recent reliance on severance, the reality that underlies such a remedy is that it "giv[es] legislatures an incentive to disregard possible constitutional constraints when drafting legislation" and effectively cedes "too much power to rewrite statutes" to the courts.[48] Though such normative balance-of-power issues are outside the scope of this Note, it is important to note that the trend towards severance does face legitimate critiques.[49] It may be that this weak-yet-impactful remedy is inadvertently fueling the very problem upon which many critiques of Dodd–Frank are based: the Legislature's supposed inability to "strike the right balance between political accountability and independence from political influence."[50]

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47. *See* PBS NewsHour, *WATCH: Supreme Court Cannot Become a "Substitute Political Battleground," Sen. Ben Sasse says*, YOUTUBE (Sept. 4, 2018) https://www.youtube.com/watch?v=DcbOYl6Kutc&t=652 [https://perma.cc/J6CA-APZZ] ("Knowing that our elected officials no longer care enough to do the hard work of reasoning through the places where we differ, and deciding to shroud our power at times, it means that we look for nine Justices to be 'superlegislators.' We look for nine Justices to try to right the wrongs from other places in the process.").

48. Hickman, *supra* note 24, at 1490.

49. *See generally* David H. Gans, *Severability as Judicial Lawmaking*, 76 GEO. WASH. L. REV. 639 (2008); John Harrison, *Severability, Remedies, and Constitutional Adjudication*, 83 GEO. WASH. L. REV. 56 (2014).

50. Hickman, *supra* note 24, at 1497.

More important to this analysis is that severing the CFPB Director's for-cause removal protection would have significant ripple effects on the other structural, independence-granting features of the CFPB, namely the Director's specified term of tenure[51] and its "authority to avoid centralized review of congressional testimony, legislative proposals, and budget submission."[52] Despite the observation that structural characteristics of independence do not correlate across agencies,[53] it appears that for-cause removal protection serves as a quasi-prerequisite to other features of structural independence. Term of tenure is simple: if the President can remove the CFPB Director at will, his five-year term becomes nothing more than an upper limit on tenure for good behavior, not a feature of independence. The Bureau's ability to avoid congressional interference is similarly predicated on its Director's for-cause removal protection. This view is supported by comparing the subset of administrative agencies that enjoy for-cause removal protection to the subset that enjoys full or partial congressional bypass authority: the latter is, with only one exception, fully encompassed by the former.[54] The fact that the Legislature has structured only one administrative agency to have congressional bypass authority without removal protection casts further doubt on the idea that severance of the CFPB Director's for-cause removal protection is a nonintrusive remedy.

Thus, the fundamental problem with for-cause-removal severance as a remedy is that it tends to turn independence from executive influence into an all-or-nothing game (i.e., an agency is either fully independent, or it can enjoy no independence whatsoever). Rather than considering and parsing out the nuance of the Legislature's highly intentional design of the CFPB—which relies on multiple, interrelated characteristics of independence—severing the Director's removal protection takes a hammer to that design, eliminating any semblance of independence. This problem is perpetuated by the conventional, yet faulty, wisdom that administrative agencies fall into one of two discrete categories—executive or independent—despite a nearly even distribution of various independence-granting features across both kinds of agencies.[55] Undoubtedly, the legislators who drafted the Dodd–Frank Act believed that they were capable and permitted to craft a novel agency that falls outside the binary categories envisioned by courts.[56] Thus, the

51. *See* 12 U.S.C. § 5491(c)(1) (2018) ("The Director shall serve for a term of 5 years.").

52. Datla & Revesz, *supra* note 46, at 803; *see also* 12 U.S.C. §§ 5492(c)(4), 5497(a)(4)(E) (granting structural independence features to the office of the Director).

53. *See infra* subpart III(B) (discussing agency structures).

54. For a comparison of these agency subsets, see Datla & Revesz, *supra* note 46, at 786 tbl.1, 804 tbl.6. The conspicuous exception to this rule is the International Trade Commission, which has no removal protection but has the limited privilege to "submit[] [its] budget to Congress on or before [the] date [the] President does." *Id.* at 805 n.196. This level of bypass authority is hardly comparable to that enjoyed by other agencies on the list, including the CFPB.

55. *Id.* at 829 tbl.9.

56. *See supra* subpart I(B).

Legislature's intent for the CFPB will necessarily be frustrated by a Supreme Court ruling that forces the Bureau into the traditionally "executive" category where it no longer enjoys even a modicum of independence from executive control.

A Supreme Court decision to sever the CFPB Director's for-cause removal protection will inextricably shackle the Bureau's capacity for rulemaking, enforcement, and consumer protection to the impulses of the sitting president. As a symbolic proxy for agency independence since its confirmation as a constitutional restriction in *Humphrey's Executor*,[57] for-cause removal (coupled with a term of tenure) ensures medium-term consistency in agency vigor, which is fundamental to the Legislature's clear intent to construct a CFPB that is relatively independent from political pressures.

B. A Declaration that the CFPB Is Fully Unconstitutional Will Strip the Legislature of Its Ability to Creatively Design Administrative Agencies in the Future

The Legislature should be alert to the damaging jurisprudence that will follow from a Supreme Court decision to dismantle the CFPB. Imposing an arbitrary ceiling on the scope of constitutional agency design will inhibit the Legislature's ability to design agencies to fit the unique needs of other complex problems, and it will likely prevent the Legislature from redesigning the CFPB in a way that achieves something close to its intended independence from political influence.

Though the Supreme Court could give weight to Judge Henderson's suggestion that Dodd–Frank's severability clause is not dispositive of its appropriateness as a remedy, rejecting severance and striking down the CFPB entirely "would require that the Court identify provisions [of Dodd–Frank] that Congress could modify."[58] Stated differently, the Supreme Court would be forced to clarify its theory of agency design such that the Legislature could "remake" the CFPB in a constitutional fashion. Based on its holding in *Free Enterprise*, it would be unsurprising for the Court to combine its "tendency to analyze individual separation-of-powers principles" with its newfound interest in the "novelty of agency structures," ultimately elucidating a functional separation-of-powers approach to administrative design.[59]

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57. Notably, some administrative agencies, including the SEC, have "read in" for-cause removal protection in the wake of *Humphrey's Executor*. *See* Roberta Romano, *Does Agency Structure Affect Agency Decisionmaking? Implications of the CFPB's Design for Administrative Governance*, 36 YALE J. ON REG. 273, 302 (2019) (noting that SEC commissioners are "widely perceived to have removal protection by courts and commentators").

58. Deneen, *supra* note 38, at 620.

59. *Id.* at 617.

The Legislature should fear such an outcome. For over a century, the Legislature has remained relatively unconstrained in its ability to experiment with "novel" combinations of agency characteristics,[60] a freedom stemming directly from useful ambiguity surrounding this area of constitutional law. A "functional" separation-of-powers doctrine would inevitably impose limitations on the Legislature's design choices and would have a chilling effect on the creation of new agencies to solve complex problems moving forward. Thus, even the slightest possibility that the Supreme Court will endorse such a sweeping alteration to legislative constraints warrants legislative concern.

C. Paradoxically, a Finding of Full Constitutionality for the CFPB Is Likely Its Least Positive Outcome

The Legislature's interest in restructuring the CFPB will remain compelling regardless of the precise nature of Supreme Court intervention. Should the Court come to the surprising conclusion that the Bureau is not unconstitutionally structured, a combination of legislative inertia, vindication, and indifference will likely entrench the CFPB's design as it exists now. Preserving that design—most importantly, the Director's five-year term—leaves little room for robust winding up or winding down of consumer protection upon the election of a new President, and it fails to address the demonstrated potential for appointment gamesmanship.[61]

On a practical level, Supreme Court rulings on controversial political issues can fail to have the desired, decisive effect on political disagreement that one might expect. For instance, the Court's determination that the Affordable Care Act's individual mandate is a valid exercise of congressional authority did little to dissuade Republicans' insistence for its repeal. Rather, the decision set off a five-year political battle that ultimately achieved repeal.[62] Similarly, Republicans are unlikely to concede the CFPB's design issue merely because the Supreme Court sanctions it. Rather, such a decision could spark even more aggressive opposition to the CFPB and other components of the administrative state.

In fact, some scholars of agency design consider political support—or lack thereof—to be the most significant predictor of an agency's long-term success.[63] Generally speaking, they suggest that "[a]n agency cannot operate effectively if it lacks a supportive constituency, or if the effort to implement

60. *See* Romano, *supra* note 57, at 300–01 (noting the Consumer Product Safety Commission and the Commodity Futures Trading Commission as two examples of novel agency design).

61. *See infra* section III(B)(1).

62. Sy Mukherjee, *The GOP Tax Bill Repeals Obamacare's Individual Mandate. Here's What That Means for You*, FORTUNE (Dec. 20, 2017, 12:00 AM), http://fortune.com/2017/12/20/tax-bill-individual-mandate-obamacare/ [https://perma.cc/RT3U-FCJ2].

63. David A. Hyman & William E. Kovacic, *Why Who Does What Matters: Governmental Design and Agency Performance*, 82 GEO. WASH. L. REV. 1446, 1484 (2014).

its duties arouses debilitating political opposition."[64] The CFPB faces both of these problems. Its current structure is likely to always be subject to questions of legitimacy (regardless of a Supreme Court ruling to the contrary), evoking intense ideological recoil.[65]

With these various potential outcomes in mind, the Legislature truly has no hope of "winning" the CFPB debate in the judicial forum. It must instead respond to any interference with, or vindication of, the Bureau's current structure via amendment, with the goal of ensuring its long-term viability. The following Part will suggest a framework for realizing this goal.

III. Restructuring the CFPB Will Obviate Future Supreme Court Interference and Ensure the CFPB's Viability over the Long Term

Given the analysis of the negative outcomes presented above, the Legislature should strategically plan to redesign the CFPB. In doing so, the Legislature's primary goals should be to: (1) maintain the characteristics of independence that make the CFPB particularly useful for consumer protection; (2) relinquish any characteristics of independence that are counterintuitively harmful to the CFPB; and (3) relinquish those characteristics of independence destined to draw constitutional scrutiny.

With respect to constitutional scrutiny, this analysis will rely on one fundamental assumption about Judge Kavanaugh's *PHH* dissent: that his most relevant and threatening argument is that the CFPB's structure diminishes presidential authority. This assumption is likely valid given that, unlike his other proposed arguments, his concern for presidential authority has a constitutional hook in Article II. A Supreme Court holding based solely on historical practices and liberty concerns[66] unrooted in the text of the Constitution would be surprising and deeply concerning. Therefore, this Part proposes a CFPB redesign that directly cures the concerns related to the diminution of Presidential authority.

A. A Single Director with For-Cause Removal Protection Is Necessary to Efficiently Respond to Consumer-Protection Issues During Consumer-Friendly Administrations

Recent developments in the CFPB's leadership suggest that the Bureau's unique structure does not insulate it from political forces quite as well as its creators may have hoped. The Bureau's former Director, Mick Mulvaney, expressed open hostility to the CFPB's very existence and

64. *Id.*

65. Arthur E. Wilmarth, Jr., *The Financial Services Industry's Misguided Quest to Undermine the Consumer Financial Protection Bureau*, 31 REV. BANKING & FIN. L. 881, 919 (2012).

66. *See* PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 166 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting) ("Three considerations inform my Article II analysis: history, liberty, and Presidential authority.").

introduced a strict textualist approach to carrying out its legislative directive.[67] Mulvaney openly refers to the CFPB as "Elizabeth Warren's brainchild" and "not in the same class [as the SEC],"[68] and his track record at the Bureau demonstrated a rapid departure from the energetic performance of his predecessor.[69]

In response to these developments, the Legislature *could* elect to restructure the CFPB's leadership to mitigate the effects of an unenergetic single Director. The pitfalls of this approach, which most directly calls for a multimember commission structure, are discussed in subpart III(C) below.[70] Instead of attempting to solve this potentially unsolvable problem, the Legislature should instead seek to preserve the benefits of the CFPB's current structure, under which "we will at least have strong consumer protection during consumer-friendly administrations, which is significantly more than we had before."[71]

One commentator points out that the Consumer Product Safety Commission (CPSC) presents a strong case study for the move towards single-director agencies.[72] Wilmarth notes that though the "CPSC was 'the inspiration' for CFPB's creation" in many respects, the Legislature was right to choose a more efficient leadership structure for the CFPB because "CPSC is now 'widely regarded as one of the least politically independent and influential agencies in government.'"[73] A 1987 study by the General Accounting Office (GAO) supports this argument, suggesting that the CPSC's lack of stability, high turnover, squabbles among commissioners, and delays in decision-making were largely attributable to its multimember structure.[74] To solve these problems, the study suggested that the CPSC adopt the unified leadership of a single director, a characteristic shared by "seven

67. *See* Mick Mulvaney, Acting Dir., Consumer Fin. Prot. Bureau, Remarks at the American Bankers Association Annual Conference 5 (Apr. 24, 2018), https://assets.documentcloud.org/documents/4446622/Transcript-Mulvaney-ABA-Conference-4-24-2018.pdf [https://perma.cc/94GL-E3UZ] ("I don't see anything in here that I have to run a Yelp for financial services sponsored by the federal government. I don't see anything in here that says that I have to make all of those public.").

68. *Id.* at 10.

69. *See* Ken Sweet, *Under Trump and Mulvaney, CFPB Has Filed No Enforcement Actions Since November*, USA TODAY (Apr. 10, 2018, 10:52 AM), https://www.usatoday.com/story/money/economy/2018/04/10/under-trump-mulvaney-cfpb-has-filed-no-enforcement-actions/502451002/ [https://perma.cc/MXH3-AFFR] (detailing the lack of CFPB action under Mulvaney's direction).

70. *See infra* subpart III(C).

71. Jean Braucher & Angela Littwin, *Examination as a Method of Consumer Protection*, 87 TEMP. L. REV. 807, 815 (2015).

72. *See* Wilmarth, *supra* note 65, at 920.

73. *Id.* (quoting Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEXAS L. REV. 15, 71 (2010)).

74. *Id.* at 921.

of the eight other health and safety regulatory agencies."[75] It is reasonable to believe that the GAO's recommendation analogously applies to the CFPB, and a multimember commission would render the Bureau similarly dependent and uninfluential, which will be discussed at length in subpart III(C).

The practical case for the Director's for-cause removal protection has already been addressed.[76] Because many of the benefits of the CFPB's current design depend on for-cause removal protection to be effective, the Legislature should leave any alteration to the Director's removal protection off the table, even if that means adding it back to Dodd–Frank should the Supreme Court sever it in its current form.

B. The Five-Year Term Is Harmful to the CFPB and Constitutionally Suspect, and Budget Autonomy Could Pose a Constitutional Threat in the Future

1. The CFPB Director's term length should be shortened to four years.—Though the CFPB's single-Director leadership does in theory allow for strong consumer protection during consumer-friendly administrations, the Director's five-year term serves as a significant and practical impediment to this benefit. In his *PHH* dissent, Judge Kavanaugh did address the mechanical problem posed by the five-year term:

> A President possesses far less influence over the single-Director CFPB. The single CFPB Director serves a fixed five-year term and, absent good cause, may not be replaced by the President, even by a newly elected President. The upshot is that a President may be stuck for years with a CFPB Director who was appointed by the prior President and who vehemently opposes the current President's agenda. To illustrate, upon taking office in January 2017, the President could not appoint a new Director of the CFPB, at least absent good cause for terminating the existing Director. It will get worse in the future. Any new President who is elected in 2020, 2024, or 2028 may spend a majority of his or her term with a CFPB Director who was appointed by a *prior President*. That does not happen with the chairs of the traditional multi-member independent agencies. That dramatic and meaningful difference vividly illustrates that the CFPB's novel single-Director structure diminishes Presidential power more than traditional multi-member independent agencies do.[77]

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75. *Id.* (quoting U.S. GEN. ACCOUNTING OFFICE, GAO/T-HRD-87-14, TESTIMONY: ADMINISTRATIVE STRUCTURE OF THE CONSUMER PRODUCT SAFETY COMMISSION 1 (1987)).

76. *See supra* subpart II(A).

77. PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 167 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting).

Inexplicably, Judge Kavanaugh managed to recognize this problem without considering that the five-year term is its root source. It is possible that Kavanaugh dismissed "term length as a remedy" out of hand, perhaps viewing it as the kind of "'editorial freedom' [that] would take courts far beyond [their] judicial capacity and proper judicial role."[78] However, his dissent may instead indicate a conventional bias in favor of for-cause removal severance, rather than more targeted remedies that go just far enough to cure legitimate concerns of constitutional defects.

If, as Kavanaugh's dissent repeatedly implies, a President's potential inability to "supervise and direct" the CFPB Director is the primary concern, then limiting the Director's term length to four years is undoubtedly the most nonintrusive remedy available. A four-year term would offer each President a fair—yet purposefully limited—opportunity to "supervise and direct" the CFPB by choosing a Director who properly reflects his or her general principles with respect to consumer protection. In addition, keeping the Director's for-cause removal protection guarantees "intra-Presidential" tenure (absent good cause for removal), which at least inhibits arbitrary dismissal over post-appointment political disagreements.

The benefits of a four-year term also transcend the constitutionality problem. The fact that Mick Mulvaney served as an unconfirmed, "Acting" Director of the CFPB for over a year demonstrates that the five-year term may incentivize Presidents to "game" the appointment and confirmation system. A hypothetical President with extreme views on consumer-protection issues could strategize to postpone the approval of his CFPB Director until late into his or her term, thereby "blocking" the subsequent President's ability to "wind up" or "wind down" the CFPB for his or her entire tenure. No such incentive exists under a limited,[79] four-year-term regime.

Elizabeth Warren warned that agency capture would be the "main regulatory design challenge" that faced the creation of the CFPB.[80] The Director's five-year term has inadvertently left open the possibility for "political capture" by unscrupulous presidents, whose appointment gamesmanship could subject the Bureau to Warren's fear of agency capture for far longer than a four-year term would allow. Though it may not be a sufficient edit standing alone, changing the CFPB Director's term to four years should be the Legislature's primary redesign goal, most notably because it rationalizes the maintenance of the Director's for-cause removal protection regardless of the Supreme Court's forthcoming remedy.

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78. *Id.* at 200. This is how Kavanaugh described the potential remedy of restructuring the CFPB as a multimember commission, which can hardly be considered "targeted" the way a term-length edit would be.

79. The Legislature would have to ensure that the Director's four-year term runs with the President's term.

80. Hyman & Kovacic, *supra* note 63, at 1487 (quoting Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 99 n.325 (2008)).

2. The Legislature should subject the CFPB's budget to approval by the Federal Reserve Board.—The above reading of Kavanaugh's *PHH* dissent may appear to suggest that shortening the CFPB Director's term to allow greater Presidential oversight would, by itself, cure its alleged constitutional defect. However, Judge Kavanaugh subtly alluded to a second constitutional defect without discussing it in full: the CFPB's budgetary insulation from congressional appropriations.[81] Relegating the issue to a footnote, Kavanaugh claimed that "[t]he CFPB's exemption from the ordinary appropriations process is at most just 'extra icing on' an unconstitutional 'cake already frosted.'"[82]

Critics of the CFPB's budgetary insulation commonly suggest that "[t]he entire point of [the Appropriations Clause] is to *force* Congress to take ownership of the government's spending choices, in order to promote accountability and fiscal restraint."[83] Self-funding is viewed as exploitative of the legislative system, preying on the "tremendous inertia within the legislative process"[84] and the fact that statutes, while difficult to enact, "are doubly hard to repeal."[85] In essence, critics are skeptical of budgetary autonomy per se because it potentially impedes a sitting Legislature's ability to alter unwise budgetary appropriations of previous Legislatures.

However, the notion that the Constitution forbids administrative agencies from enjoying insulation from appropriations does not reflect reality. The Federal Reserve Board (FRB), among others,[86] funds its operations by retaining surplus earnings from the Federal Reserve Banks, not through congressional appropriations.[87] Critics contend that analogizing the CFPB to the FRB is invalid because the FRB's "special function . . . is not executive in nature," unlike the CFPB's task of "administer[ing] a broad array of consumer financial protection statutes that afford plenty of opportunities for arbitrary and capricious law enforcement."[88] Furthermore, the CFPB's budget is capped at 12% of the FRB's operating expenses, which may invite a *Free Enterprise*-esque argument that the CFPB enjoys a dual-

81. *See* 12 U.S.C. § 5497(a)(1)–(2) (2018). The CFPB's budget is derived from the Federal Reserve Board, "determined by the Director" though not to exceed 12% of the "total operating expenses of the Federal Reserve System." *Id.*

82. *PHH*, 881 F.3d at 197 n.19 (Kavanaugh, J., dissenting).

83. C. Boyden Gray, Development, *Extra Icing on an Unconstitutional Cake Already Frosted: A Constitutional Recipe for the CFPB*, 24 GEO. MASON L. REV. 1213, 1226 (2017).

84. *Id.* (quoting Jonathan H. Adler, *Placing 'REINS' on Regulations: Assessing the Proposed REINS Act*, 16 J. LEG. & PUB. POL'Y 1, 20 (2013)).

85. *Id.* (quoting William N. Eskridge, Jr., *Vetogates,* Chevron*, Preemption*, 83 NOTRE DAME L. REV. 1441, 1453–54 (2008)).

86. *Id.* at 1228 (listing "the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the National Credit Union Administration, and the Federal Housing Finance Agency" as other examples of agencies with budgetary autonomy).

87. *See* 12 U.S.C. § 289(a)(3) (2018).

88. Gray, *supra* note 83, at 1228.

layer appropriations exemption[89] that unconstitutionally insulates it from legislative control rather than executive control.

Because such an argument has never been tested, it is impossible to know if the Supreme Court could legitimately find the CFPB's structure unconstitutional solely because of its unusual budget. However, if the Legislature were to alter Dodd–Frank to allow the FRB to independently approve of the CFPB's requested budget, it would become significantly more difficult for the Supreme Court to make this argument. Such an approval scheme would liken the CFPB's budget to that of the Office of the Comptroller of the Currency, which is subject to the general direction of the Treasury Department, which itself is funded via congressional appropriations. Based on the legislative history of 12 U.S.C. § 289 (which governs the FRB's budget), the Supreme Court would truly be stretching to claim that the FRB is completely outside the appropriations process, given that its budget cap has been amended by statute—arguably "appropriated"—three times in the last four years.[90]

In combination with a four-year Director term, this proposed alteration would serve to undermine any remaining doubt about the constitutionality of the CFPB's structure. Rather than putting a Band-Aid on the primary problem espoused in Judge Kavanaugh's dissent—insulation from the Executive—this two-part solution further limits future constitutional scrutiny on the basis of Kavanaugh's "icing on the cake"—insulation from the Legislature.

C. Restructuring the CFPB as a Bipartisan Commission Would Fail to Cure Partisanship Concerns and Impede the Bureau's Ability to Protect Consumers

Some suggest that replacing the CFPB's single Director with a bipartisan, independent commission would most efficiently cure the Bureau's alleged "unusual[] vulnerab[ility] to idiosyncratic priorities and decisionmaking."[91] This argument boils down to a normative aversion to unchecked, partisan influence on powerful administrative agencies like the CFPB. In practice, the "bipartisan commission solution" is unlikely to have any substantial impact on the CFPB leadership's alleged tendency toward partisan decision-making, and such a solution would necessarily have undesirable effects on the Bureau's responsiveness to consumer-protection issues.

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89. Parallel to "dual-layer for-cause removal" from *Free Enterprise*.

90. Bipartisan Budget Act of 2018, Pub. L. No. 115-123, § 30205, 132 Stat. 64, 127; Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115-174, § 217, 132 Stat. 1296, 1326 (2018); Equity in Government Compensation Act of 2015, Pub. L. No. 114-94, § 32202, 129 Stat. 1310, 1739.

91. Todd Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace?*, 81 GEO. WASH. L. REV. 856, 876 (2013).

As a preliminary matter, scholarship in this area should dispel the unfounded wisdom that the expertise of independent agencies with multiple members somehow insulates them from partisan influence. Conversely, a study of commissioner voting patterns over four decades concluded that "commissioner partisan affiliation exhibits robust and large predictive power over votes, even holding constant the party of the appointing president . . . reject[ing] the notion that expertise exclusively drives decision making."[92] The study suggests that the idyllic notion that multimember commissions are capable of (and much less, actually practice) engaged discourse aimed at ideological compromise is misguided.

The most glaring source of partisan influence on multimember commissions stems from the relative ease with which sitting presidents can obtain partisan majorities. A study of the partisan makeup of twelve independent commissions between the presidencies of Warren Harding (1921) and George W. Bush (2008) found that "Presidents were able to obtain a majority on each commission in *all cases except one*," taking an average of only nine or ten months to do so.[93] The authors of that study noted a significant uptick in openly partisan appointments during the Reagan Administration, which "assiduously sought loyalty and ideological compatibility" by emphasizing "the need for appointees to see themselves as part of a unitary administration and not as a manager of some discrete agency."[94] Separately, Justice Elena Kagan recounts an evolution of presidential oversight during her time as Associate White House Counsel, noting that President Clinton was able to "bring these [independent] agencies into an OMB-led, administration-wide regulatory planning process,"[95] likely because Clinton "had less reason than Reagan to fear the reaction of a still-Democratic Congress."[96]

Perhaps because of the ease with which presidents create and influence their desired majorities, the above-noted executive forays into quasi-control of independent agencies has had marked effects on confirmation politics. Whereas confirmations were once a "process of conflict avoidance and resolution," the Senate has recognized their newfound political import, turning such hearings into public policy battlegrounds by subjecting nominees to "the full array of parliamentary weapons," including heightened

92. Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 493–94 (2008) (quoting Daniel E. Ho, *Congressional Agency Control: The Impact of Statutory Partisan Requirements on Regulation* 4 (Am. Law & Econ. Ass'n, Working Paper No. 73, 2007)).

93. *Id.* at 469 (emphasis added). This represents an average of two extremes: presidents whose predecessors come from the same party averaged only one to two months, whereas those whose predecessors come from the opposite party averaged thirteen to fourteen months.

94. *Id.* at 481.

95. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2308 (2001).

96. *Id.* at 2288.

scrutiny, longer hearings, and even filibusters.[97] Furthermore, because of the phenomenon of appointment "batching,"[98] minority parties have developed strategies for securing the appointment of highly partisan minority loyalists even during opposing presidential administrations.[99]

Thus, the current political landscape of multimember commissions appears to be characterized by increasingly partisan commission members who vote predictably along party lines. It would, therefore, be deeply counterproductive to restructure the CFPB as a bipartisan commission solely to constrain its administration-dependent ideological biases. Rather than achieving the ideal balance of reasoned arguments and informed decisions, a multimember CFPB would likely be susceptible to the aforementioned trends in commission voting, "where the majority does not alter its position and takes action irrespective of strong objections by the minority."[100] Admittedly, there is a valid concern that minority voices, even if ineffective at influencing outcomes, serve a valuable purpose as "whistleblower[s] to actions taken by the majority which have potentially serious ramifications."[101] However, it is entirely possible that the CFPB Director's duty to consult with other federal regulators and respond to their written objections more efficiently serves this exact purpose.[102]

It appears, then, that the benefits conferred by the CFPB's single-Director structure, including its "efficiency, stability, and decisiveness,"[103] strongly outweigh the risks associated with multimember partisanship. From extended leadership deadlock arising out of the increasingly politicized confirmation process to potential institutional paralysis by partisan members, a multimember structure would do little but slow down the CFPB's consumer-protection agenda during periods of presidential turnover.

Conclusion

Given that the Supreme Court will soon address whether the CFPB's structure unconstitutionally limits the President's Article II removal power, the Legislature must begin planning legal countermeasures to potentially heavy-handed intrusion on the Bureau's independence. Neither the Legislature nor the CFPB can hope for a positive outcome in the Supreme

97. Devins & Lewis, *supra* note 92, at 487–88.

98. *Id.* at 489 ("[T]he President often makes multiple nominations to the same commission simultaneously because some commissioners decide not to complete terms at the very time that other commissioners' terms expire.").

99. *Id.* at 490.

100. Soucy, *supra* note 4, at 712.

101. *Id.*

102. *See* 12 U.S.C. § 5495 (2018) ("The Bureau shall coordinate with . . . other Federal agencies and State regulators . . . to promote consistent regulatory treatment of consumer financial and investment products and services.").

103. Wilmarth, *supra* note 65, at 921.

Court, so the Legislature must instead look to the future and plan to redesign the CFPB in such a way that preserves its necessary features of independence and relinquishes those features that would inevitably draw further Article II scrutiny. Fortunately, the Legislature can justify the most important aspect of the Bureau's redesign—changing the Director's five-year term to four years—based purely on public policy concerns, as the Director's term length currently subjects the office to undesirable political gamesmanship and appointment strategizing. Thus, there is no reason such a constitutional redesign would be perceived as pitting the Legislature *against* the Supreme Court.

The "new" CFPB will look very similar to what exists today. Its single Director with for-cause removal protection will still have the capacity to energetically pursue consumer-protection measures in isolation from political impulses, but presidents will no longer endure the randomness of arbitrary waiting periods before choosing the right Director for the job. In the event the Legislature chooses to more resolutely preclude future constitutional scrutiny, the CFPB's budget may ultimately require approval by the Federal Reserve Board. Though it is unclear what effects that approval process would have on the CFPB Director's independence, the Legislature should welcome the opportunity to experiment with the Bureau's design in the hopes of eventually perfecting a structure that best addresses the unique problems inherent in consumer financial protection.